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FEBRUARY 12. 1793.

MIN. YORK-BUILDINGS Co.

AGAINST
ALEX. MACKENZIE, W. S.

MINUTES

FOR

The GOVERNOR and COMPANY of UNDERTAKERS for
raising Thames Water in York-buildings ;

AGAINST

ALEXANDER MACKENZIE, Writer to the Signet.

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ALEX. MACKENZIE, W. S.

Geo. Johnston, W. S. Agent.

C. Clk.

MINUTES

F O R

The GOVERNOR and COMPANY of UNDERTAKERS for
raising Thames Water in York-buildings ;

A G A I N S T

ALEXANDER MACKENZIE, Writer to the Signet.

ADVOCATUS for the York-buildings Company, represented,
That the petitioner Mr Mackenzie having, in the answers
given in to the petitory part of the Company's answers to the ori-
ginal reclaiming petition, deviated considerably from that part of
his duty, by bringing forward, in fact, a reply to the argument
urged on the part of the Company in the answers, he should now,
in this minute, which the above conduct of the defender had ren-
dered necessary, and with which the justice of their Lordships
had indulged him, avoid falling into the same error, by confining
himself strictly to the new argument urged in that paper, though
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he would, at the same time, in terms of the desire of the Court, state certain cases which appear to be very much in point, and the principle of which tended to support the general rule of law established by the interlocutor submitted to review. That it was obvious, upon a perusal of the full and elaborate petition presented for Mr Mackenzie, that a material and principal part of his argument went, not only to the general point determined by the interlocutor reclaimed against, *viz.* that as common agent he was debarred from purchasing the two lots in question, but to justify or explain away a variety of circumstances of negligence and impropriety in the defender's conduct, which entered deeply into the consideration of your Lordships in pronouncing the interlocutor, and formed, as the respondents conceived, an ingredient on which the opinion of the Court proceeded. In the answers to that petition, the respondents were directly called upon to notice these points of the petitioner's argument; and in doing so, they cannot conceive that they went beyond their duty as respondents, or did more than what the appointment of your Lordships to answer the petition, exactly required of him. But as the interlocutor of the 6th of July last, rested the judgment of the Court merely upon the general fact, that Mr Mackenzie was common agent when those improprieties, so anxiously endeavoured to be obviated in the petition, formed a chief ground for that judgment, the respondents felt it their duty to annex a petitory prayer to their answers, craving, upon the grounds above stated, an alteration or explanation of the interlocutor, in so far that the fraudulent, or at least improper conduct of the common agent in this particular case, might be given as the reason why the sale was reduced, independent of the general reason of incapacity, upon which, by the terms of the interlocutor, the judgment was founded. Upon the pretext, that this was a new petition, and to which the defender was entitled to give an answer, although the grounds of that petition naturally arose from the answers which the respondents were obliged to give to Mr Mackenzie's petition, he obtained leave to give in an additional paper, and which, though directed to be strictly confined to the grounds upon which the respondents petition was founded, is neither more nor less than a reply to the whole of the respondents argument; extending to 44 printed pages, and treating the whole cause almost as fully as in the original petition against the interlocutor. The respondents could not, in the shape of a minute, reply to all the argument urged in this last paper, without following Mr Mackenzie through every part of that paper;—a task which

which they consider themselves precluded from discharging, by the very limited nature and form of the present minute, as well as the injunctions which the Court laid upon them, in allowing them the present privilege; and if any disadvantage can arise to them from that circumstance, the defender will, contrary to the forms of Court, have in this respect got the better of them, by obtaining what he was not entitled to, the benefit of the last word; an advantage which, considering the deliberation under which the last interlocutor was pronounced, the respondents trust cannot operate to their prejudice, when they look back to the full and accurate manner in which this part of their cause has already been treated of in their answers; or when they reflect upon the opinion, which your Lordships universally concurred in, in expressing of the impropriety at least, of the defender's conduct, if you did not all concur in thinking that it amounted to the strict charge of positive fraud.

But what the respondents conceive to fall directly within the purpose of the present reply, and where they considered Mr Mackenzie's counsel to have completely wandered from his duty, when he entered upon the subject at all, was the argument maintained in his answers, upon the abstract proposition in law maintained by the respondents, *viz.* That if the transaction complained of, founded the York-buildings Company in a claim of damages to any extent against Mr Mackenzie, as seemed to be almost the unanimous opinion of the Court was the case, it followed of necessity, that the sale ought to be reduced; because your Lordships could not arrive at the first conclusion, without admitting a wrong upon the part of Mr Mackenzie, which necessarily and inevitably led to the last, a complete voidance of the sale. The pains which has obviously been taken in the elaborate and metaphysical argument maintained upon this point of the cause by the counsel for Mr Mackenzie, too clearly demonstrated, that this was the principal point to which he wished their Lordships attention to be directed, though the argument of the respondents upon that point, had as little to do with the petitory part of their answers, as any question upon a doubtful point of feudal law, or the validity of a freehold-qualification. The respondents, therefore, considering themselves strictly in form to reply to the argument upon that point, requests the attention of the Court to the following observations.

The reply of Mr Mackenzie upon this point is ushered in with a common place observation, that the respondents urging it, is to
Anf. p. 39.
be

be explained only upon the footing, that they could not otherwise support their action, and that however artificial, and extraordinary the argument is, it merits at least the praise of novelty, having never been hazarded in any former stage of the cause. That though it was hardly necessary to offer a serious reply to such an observation, the respondents could not help observing, that they must have spent your Lordships time and their own trouble very unnecessarily, if they trusted to this argument as sufficient to support what was formerly at such length maintained for them; and as to the charge of its being new, they always considered that any legal argument, arising out of the facts which the ingenuity of counsel could suggest, was perfectly fair at all stages of a cause, though in the present case it had not the merit of novelty, having naturally occurred from the reasoning maintained on the bench at the last advising, and which it was equally competent for the petitioner, as for the respondents, to notice in their respective papers.

That leaving this observation as it stood, the argument itself was endeavoured to be obviated by Mr Mackenzie, by subdividing his answers to it under *three* different heads: 1st, By assuming it as proved, that his conduct was not directly fraudulent: And, 2^{dly}, By alleging, that his conduct was not liable to the imputation of constructive fraud; both of which propositions, if true, relieved him from both the reduction and the conclusion for damages: And, 3^{dly}, By maintaining, that if the respondents meant to infer, without alleging either direct or constructive fraud, that the same principles which led to the conclusion of damages, led also to a avoidance of the sale; it was impossible to justify such a proposition either upon common justice or the established rules of common law.

That the respondents would consider each of these in their order; but they could not avoid prefacing what they had to say upon each, with this observation, applicable to all, that the defender argued his case (and his original petition was not free from the same observation) just as is usually done for a pannel in a criminal pursuit, by dividing and subdividing the whole charge into separate points and articles; by endeavouring to shew, that each standing by itself was insufficient, and that the conclusion inferred could not therefore follow; though taking the whole facts and circumstances together, and looking to the general complexion of the case, there may not be a doubt as to the conviction. Precisely in this view did the paper of Mr Mackenzie occur to the

the respondents, and they would justify the remark by the following observations :

Although, from what passed in Court when the last interlocutor was pronounced, the respondents had not much ground to expect an alteration of their Lordships opinion on the question, whether a direct charge of fraud was proved against the defender or not, yet it was a mistake in his counsel to suppose, that this matter was at rest, as the pursuers do most assuredly mean to insist for a special judgment upon that point. At present they would leave the point to stand upon the argument already urged on both sides, in the papers which are and have been before the Court. But what they chiefly requested their Lordships attention to, was the argument maintained in order to show, that there was no constructive fraud in this case, sufficient either to reduce the sale, or found damages, or, leaving constructive fraud out of the question, any principle of law which could justify such a conclusion.

The sum total of the defender's observations upon these points seemed to amount to this, that, as seller of this estate, he did every thing which a man of ordinary abilities could have done, in discharging such a piece of duty; 'as buyer, on the other hand, 'what was it that he did? He rose up and offered at the sale. 'Did it require a man of consummate prudence to take so very 'easy and simple a step? He did nothing else. He did not utter 'another syllable, and took no step, either direct or indirect, to 'render his offer effectual, and to prevent the interference of 'competitors.' The fallacy of this reasoning appeared to the pursuers perfectly obvious. It lay clearly in this, that though every thing might be perfectly true, when stated in the mouths of seller and buyer, when separate and unconnected persons; yet it was not true when stated in the mouth of the defender, uniting in his person two opposite characters, and endeavouring to discharge the duties absolutely incompatible. He was bound, as seller, to do of his own accord what Mr Taylor suggested, *viz.* to stop the macer, who was knocking down the lots too precipitately, and by failing to do so, he failed in his duty. But as buyer, it was his interest, and he was in safety to take the estate, however precipitately or rashly it might be knocked down; and it was most consummate prudence in him to decline, in that character, interfering with the macer in the execution of his duty, and to avail himself of his precipitancy, which was not timously stopped by Mr Taylor. His business as seller then was to rise up and say, I sent Mr Taylor, a minute ago, round to stop the macer from being in such

Ans. p. 40.

a hurry, but before he could make his way up to him, the lot was knocked down; I insist upon its being again called out, because there is a chance competitors may appear. On the other hand, his duty as buyer lay the opposite way; he had a right, as Tweedie did half an hour after, to dispute his own power as agent of doing so, and to insist, that in law and justice the purchase was his, whatever consequences might arise to the creditors or common debtor. It may be perfectly true, therefore, that holding buyer and seller to be different persons, nothing was here done, which could subject either of them to the imputation of even constructive fraud against them, or which could subject either of them in any penal consequences whatever. But taking the fact as it stands, that this *buyer* and *seller* was *one* and *the same person*, bound in the same moment of time in two opposite and contradictory parts, it seems impossible to doubt, that however fair, or however beyond the reach of law the conduct of *two separate persons* might have been, the charge of a constructive fraud lies directly *against him*.

But it was farther maintained for the defender, that if the pursuers meant to say, that the same principles which led the Court to find damages due, necessarily involved a reduction of the sale, they, in maintaining such a proposition, confounded together certain rules of law which led to conclusions perfectly different, *viz.* By supposing that a failure or breach of contract, whether arising *ex dolo*, *culpa lata*, *levi* or *levissima*, all necessarily tended to the same consequence, a voidance of the contract of sale. But to this observation the same answer occurred. If the question had been, whether a sale of the estate of Seaton should be set aside altogether, upon account of what the common agent omitted to do upon the present occasion, there might have been a question, how far such purchase could be voided, or whether the common agent or seller was liable *ex dolo*, or *ex culpa levi aut levissima*, in damages to the pursuers. But the question here is, whether a *culpa levissima* even, upon the part of the defender acting as seller, combined with his availing himself of that *culpa* by acting in the opposite character of buyer, does not, all circumstances considered, of time, of place, and the incompatibility of these two characters, imply against the defender a legal wrong, from which an obligation immediately arose of reparation of that loss, which his constituents had thereby incurred. No man can be liable in damages, who is not guilty of a legal wrong; nor can any man who buys a subject, be forfeited of his right to that subject, unless
upon

upon the self same principle, that he has been guilty of a wrong in acquiring it, and of which justice will not allow him to take benefit. What then is the reparation in this case? Is it a voidance of the sale, or a sustaining of the sale, under the burden of a pecuniary reparation to the pursuers, in name of damages? It is unquestionably the first: For damages are only given, and proceed only upon the supposition, that the wrong done cannot be undone, and the party aggrieved restored to his former situation. 'If the wrong be of such a nature, as that the party injured can be restored to his former situation, this method of repairing the injury, as of all the most complete, will be preferred. Thus goods stolen are restored to the owner; and a disposition of land procured by force or fear is voided, in order that the proprietor may reassume the possession. But it seldom happens, that there is place for a remedy so complete. An observation is made in the Roman law, which generally holds, that *factum infectum fieri nequit*; and when this is the case, the person injured, in place of being restored to his former situation, must be contented with a sum of money in name of damages. A pecuniary reparation, as above observed, is commonly not adapted to the cases which come before a court of equity, and the reparations awarded by this Court, are as far as possible of the more complete kind. The person who suffers unjustly is relieved and placed in that situation to which he is entitled. And this is done by transferring the prejudice from him to the wrong doer. This will scarce be intelligible without examples, which may necessarily be classed in two different sections. First, reparation of a wrong done by a man for his own behoof; and next, a reparation of a wrong done by a man for behoof of another.' In the ensuing sections, Lord Kames gives instances of both classes depending upon the above mentioned principles. He gives as an instance of the first, the case of Stellationate, where the second purchase is set aside in favour of the first one.

Prin. of Equity,
p. 4.

' In making effectual a purchase, three circumstances only are regarded by a court of common law: *first*, Whether the vender was proprietor; *next*, Whether his consent was interposed to transfer the subject to the purchaser; and, *last*, Whether delivery was accordingly made. Yet many things may be figured that ought to render ineffectual a purchase attended with these circumstances, all of them. I give for example a prior engagement to alien the subject to another. Stellationate is a crime punishable by statute; and yet, as I have had occasion to observe,

‘ serve, a purchaser is secure by the common law, even where he
 ‘ is in *mala fide*, by having notice of the prior engagement. Such
 ‘ wrong is redressed in a court of equity ; and it is redressed in
 ‘ the most natural and most complete manner, by annulling the
 ‘ second purchase, and restoring the first purchaser to his former
 ‘ situation. This step in favour of the latter is just, being the
 ‘ proper reparation of the wrong done him ; and it is not less
 ‘ just against the former, because to him the rule applies, that
 ‘ no man is suffered to take benefit by any wrong he himself
 ‘ commits. The rule is obviously agreeable to the principles of
 ‘ justice, and to the common sense of mankind. It holds accor-
 ‘ dingly in general, that though a second purchaser, whose title is
 ‘ first completed, is at common law preferable to the first pur-
 ‘ chaser, yet the first purchaser will in equity be preferred, if his
 ‘ right was known to the other before his purchase. This short-
 ‘ hand method of preferring the incomplete title, is in effect the
 ‘ same with voiding that which is complete.’

In a subsequent section, he quotes a variety of Scotch and English
 cases, and concludes with one from Lord Stair, July 15. 1681, Camp-
 bell of Moir, the reasoning upon which seems so applicable to the
 point now under consideration, that the respondents would beg leave
 to quote it : ‘ A gentleman being abroad, and having no children,
 ‘ two of his nearest relations, who each of them had hopes of a
 ‘ settlement, agreed privately, that if the estate were disposed to
 ‘ either, the other should have a certain share. The gentleman
 ‘ thereafter disposed his estate to one of them, reserving a power
 ‘ to alter. The dispositive sent his son privately to Denmark,
 ‘ where the gentleman was ; upon which the former disposition
 ‘ was recalled, and a new disposition granted in favour of the son.
 ‘ In a process after the gentleman’s death, to fulfil the agreement,
 ‘ the defence was, that the agreement did not take place ; be-
 ‘ cause the disposition was not in favour of the defendant,
 ‘ but of his son. The Court declared the following reply rele-
 ‘ vant to infer fraud, That the defendant sent his son with the
 ‘ first disposition to Denmark, and that the same was altered
 ‘ there, in order to evade performance of the agreement. This
 ‘ case deserves peculiar attention. And, in the *first* place, I must
 ‘ cursorily observe, that the wrong here was, properly speaking,
 ‘ not fraud, because no artifice was used to deceive or circumvent.
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‘ It was obviously, however, a transgression of that fair and candid
 ‘ dealing which the connection of the parties and the nature of the
 ‘ agreement required. But what deserves chiefly to be observed is,
 ‘ that no action could lie on this agreement at common law, nor
 ‘ even in equity, because the event in which it was to be made
 ‘ effectual did not exist. The disposition was not to either of
 ‘ the parties, but to the son of one of them. Neither could there
 ‘ lie upon the wrong an action at common law for repara-
 ‘ tion, because the party injured could only qualify *lucrum cessans*,
 ‘ not *damnum datum*. But there behoved to be reparation in a court
 ‘ of equity; and as the wrong doer had no power over the estate
 ‘ which was settled on his son, the only reparation that could be
 ‘ afforded was an equivalent in money. And this is one of the
 ‘ rare cases where a court of equity must give a sum of money as
 ‘ reparation. And there appears not any reason to debar a court
 ‘ of equity from giving a pecuniary reparation, where the cir-
 ‘ cumstances admit not a reparation more complete.’ That it
 would readily occur to their Lordships, many of the circumstan-
 ces of this case were in a great measure similar to the present; but
 that the principle upon which that case was determined, and up-
 on which the pursuers trusted their case would likewise be, was
 precisely the same. The pursuers, without derelinquishing their
 allegation of a positive fraud being committed by the defender,
 or even being obliged to state, that any artifice was used on his part
 to deceive or circumvent, yet were precisely in the terms above
 quoted, when they accused the defender ‘ of a transgression of
 ‘ that fair and candid dealing which the connection of the par-
 ‘ ties, and the nature of the agreement, required.’ But in this mate-
 rial respect they differed from the injured party in the decision above
 noticed, that in his case, (and Lord Kames admits it to be a rare
 one,) the wrong doer had no power over the estate wrongously ac-
 quired, and for that reason was subjected in an equivalent repara-
 tion in money; whereas in theirs, the wrong doer was the de-
 fender himself, possessed of his estate acquired by his own wrong,
 who was capable of giving the only complete reparation which
 the case admitted of, viz. to restore the estate; and the only re-
 paration which, in the circumstances of this case, it seemed, with
 submission, competent, or in the power of the Court, to award
 in the pursuers favour.

Agreeably to what is above quoted from Lord Kames, the law
 has been laid down upon this head in the most explicit manner by
 G other:

Stair's Inst. b. 1. other authors of the first authority and eminence. 'Reparation
tit. 9. § 4.

' (says Lord Stair), is either *by restitution of the same thing in the same case*, that it would have been in, if it had remained with the owner, (*and this is most exact*): Or, *where that cannot be*, by giving the like value, or that which *may come* nearest to make up the damage, according to the desire of the damnified; and if none be found fitter, reparation must be made in money, which is the common token of exchange, and hath it in the value of every estimable.' In another place, the same author expresses

Ditto, b. 1. tit. 7. himself thus: 'In the restitution of the goods of others, though the
§ 13.

' ground thereof be *the having* of that which is to be restored, yet if the haver cease to have through his own fraud, his delinquency therein obliges him *to reparation*, as if he still had it; whence is the maxim of law *pro possessore habetur, qui dolo desit possidere*. And this extendeth not only to the thing itself, *which he must restore*, though he hath fraudulently put it away, or at least the value of it; but also it extends to the fruits which he enjoyed *mala fide*, and after he knew and had intimate to him the right of another, *so that such fruits must be restored*, though the enjoyer become not the richer thereby.'

Ersk. Inst. b. 3. In like manner, Mr Erskine, after mentioning, that 'wrong
tit. 1. § 13.

— § 14. instances where this had been so found, proceeds thus: 'Every thing by which a man's estate is lessened, is damage or loss. Damage, therefore, includes costs of suit, and all sums expended by the sufferer towards obtaining reparation. Where the party injured *can be restored precisely to his former state*, that method ought to be followed, *both as the most natural and the completest reparation*. Thus, *when goods are carried off from a person wrongfully*, he receives full indemnification, *by having the goods again put into his possession*; and being reimbursed fully of *the loss* he has sustained by being deprived of the use of them, *and of his expence in recovering them*; but where, through the extinction or deterioration of the subject, *that method of reparation cannot be effected*, the value of *the damage in money* must be ascertained by the judge; instances of which daily occur, where a subject is either destroyed or made worse by an accident in any degree imputable to another.' Indeed, it seems altogether unnecessary to urge any thing farther on this head, as
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it is one of the tritest rules of law, that *loco facti non præstabilis, succedit damnum et interesse*, and that it is only in the event of the fact not being prestable that damage is due.

With what justice, therefore, the pursuers have been accused in the defender's reply to the argument upon this point, of teasing your Lordships 'with scholastic subtilties, founded on 'evident misrepresentations,' was left to the consideration of the Court; but they concluded what they had to say upon this subject, by still maintaining it as a sound legal proposition, that if any impropriety of conduct, or any legal wrong, or any transgression of fair dealing, sufficient to infer a claim of damages against the defender, was in this case admitted, though short of either positive or constructive fraud, the necessary and inevitable result was, that the pursuers were entitled to a judgment of their Lordships, reducing and setting aside the sale *in totum*.

That having thus duplied to the reply urged upon the part of the defender, to the argument, which, it was believed, chiefly induced him to insist upon his late answers, the pursuers would endeavour, in a very few words, to lay under their Lordships consideration, these cases which lately occurred in England, the principle of which appear to them the same with that upon which the determination of this case turned, and which, upon that account alone, they submitted as worthy of attention.

The case Whelpdale against Cookson, 1747, before Lord Chancellor Hardwicke, was as follows: 'On devise of lands in trust for payment of debts, the trustee himself purchases part. Lord Chancellor said, he would not allow it to stand good, *although another person being the best bidder, bought it for him at a public sale, for he knew the dangerous consequence*; nor is it enough for the trustee to say, *you cannot prove any fraud, as it is in his own power to conceal it*; but if the majority of the creditors agree to allow it, he should not be afraid of making the precedent.'

In the case Bovey against Smith, 1682, 'A trustee having sold the land to a stranger, that had no notice of the trust, and a fine, with proclamations, and five years passed; the trustee afterwards, for valuable consideration really paid, purchases these lands again of the vendee. And it was decreed by the Lord Chancellor, with the concurring opinion of the Lord Chief Justice North, That the trustee, notwithstanding the fine, proclamations,

ports,
Vol. I. 9.

Vernon's Re-
ports, Vol. I.
No. 58.

'mations, and no claim for five years, should stand seised in trust
'as at first, as if the land had never been sold, nor any fine levied.'

Vernon's Reports, Vol. 1.
No. 139.

Ditto, vol. 1.
p. 145.

At a subsequent hearing of the case before the Lord Keeper, where the circumstances were more fully stated, the law, with regard to the incapacity of a trustee purchasing a trust-estate, does not seem to have been disputed; and it is singular, that a restoration of the estate itself, and not a pecuniary damage, was held to be in such case the legal satisfaction. The reporter, among arguments used upon that occasion, observes, That 'the plaintiff's bill is very proper to have *the land itself decreed*; for though the plaintiff may have satisfaction in damages, *yet the land being now come to the trustee again*, the best and equalest measure is to decree him to convey *the land itself*; and they cited the Lord Canmore's case, where a trust was broken, and then a full bar to the *cestui que trust*; and yet the land coming afterwards into the trustee's hands, he was decreed to convey *the land itself*, as the best measure that could be taken in that case.' It appears, however, in this case, that the purchaser had paid a full consideration for the price, that the sale of the estate had taken place above *thirty years* before, and that no positive or direct fraud was so much as alleged against him; nay it appears from the opinion of the Lord Keeper upon that occasion, that the circumstance of the trustee having, in the intermediate period betwixt the creation of the trust and the purchase of the estate, altered in some respect his situation, yet this would not of itself have been sufficient to take from him the character of trustee, to the effect of enabling him to purchase, even at a fair price, the estate which had formerly been vested as a trust in his person.

Brown's Reports, vol. 2.
p. 326.

In a later case, Twining *contra* Morrice, 1788, the agent of the seller purchasing innocently, *at a public auction*, for a third party the estate under sale, a specific performance of the contract was refused on that account. And in the argument in that case, it was stated as clear law, 'That if he, going to the sale as agent for the seller, *had bid for himself*, and had come to this Court for a performance of the contract, the Court would not decree it. *The agent or trustee of the seller cannot become the buyer*; Whelpdale *contra* Cookson, 1. Vezey, 9.' Sir Lloyd Kenyon, then Master of the Rolls, refused to decree a specific performance, or to set the contract aside, but left the plaintiff to his remedy at law. In this case a separate bill was brought against the agent, 'for the difference

‘rence between the sums of money at which the premises were
‘knocked down to him at the sale, and their real value at the
‘time, and account or issue directed for that purpose.’ But it
was stated, that the only remedy against him was at law.

Again, in the case Crowe against Ballard, 13th July 1790, an agent sold, for behoof of a legatee, a legacy of L. 1000, to which that legatee was, on the death of a liferentrix, to be entitled. On the legacy becoming due, by the death of the liferentrix, it appeared, that the agent had purchased it from his constituent in name of a third party, but for behoof of himself. A variety of other circumstances occurred in the case, not material to the present point; but the Lord Chancellor Thurlow, in giving his opinion, expressed himself as follows: ‘This case lies in narrow compass. The plaintiff was a young man, entitled to a legacy of L. 1000 upon the death of Lady Litchfield, who was 69 years of age. Ballard undertaks to sell the legacy, and pretends he took great pains so to do; but it is in evidence, that he represented it as a very hazardous business. Then he buys it himself. This is alone sufficient to set aside the transaction. *It is impossible, at any rate, that the person employed to sell can be permitted to buy. Even if this was done with the knowledge of the party selling, it could not be supported. That principle must prevail, even if he had bought fairly.*’ After enumerating a variety of circumstances, from which Ballard had endeavoured to infer a subsequent approbation or homologation of the transaction, and which his Lordship thought insufficient, he concludes, ‘I am clearly of opinion, the transaction must be set aside, and the bond delivered up: The Master must take an account of what is due between the parties, and the defendant must pay costs.’

After stating these cases, all of which were in a court of equity, and the principle of which, he submitted, their Lordships would consider as material to be attended to in forming a judgment upon this case, it seemed impossible to the pursuers to doubt, that in these courts it was a fixed and settled rule, that let a trustee, or the agent of a seller, act never so innocently in purchasing, he could not purchase for himself upon any terms, much less pretend to hold a lucrative bargain good against the seller. Although the noted case of Fox against Mackreth, had been already fully stated in the pursuer’s answers, yet he could not avoid referring their Lordships to the above mentioned book, published within these few weeks, Brown’s Reports in Chancery, wherein,

v. 2. p. 400. *et seqq.* the Court would find a very full and accurate state of the whole argument maintained in that nice and difficult cause, with the opinion of Lord Kenyon, then Master of the Rolls, and Lord Chancellor Thurlow, upon the subject. The difficulty, however, arose only as to the facts in that case being sufficient to bring Mackreth within the general rule of law above stated; but as to the law itself, and consequent incapacity, as well as the general principles which would govern such a case as the present, there was not a dissenting opinion, either at the bar, or on the bench.

In order, however, to save their Lordships as much trouble as possible, he had annexed to this minute the opinion of Lord Thurlow in the above mentioned case of Fox against Mackreth, from Brown's Reports; from which they would see, that not only all the principles contended for by the pursuers, were there fully recognised; but the facts were specially enumerated by that able Chancellor, on which he rested his opinion. From the cases above quoted, as well as from others to be found in the before mentioned book of Reports, this appears to be the practice of the Court.

This leads him to observe, that the defender seems very anxious to keep the law, and the facts of this case as separate as possible, knowing that they mutually reflect light on each other; and to contend, that the pursuers are entitled to have a judgment on the whole of this cause as it stands before the Court. It is, with submission, not sufficient that it should be found, that the sale ought to be reduced, '*in respect that the defender was common agent*;' but also, '*in respect of the other circumstances of the case*, as was suggested by one of their Lordships number, when the form of the present interlocutor was under the consideration of the Court,—That every cause must stand upon its own merits, *et ex facto oritur jus*; but by keeping the law and the facts separate, decisions might be given separately on each point against the pursuers, while a judgment might be given for them on a consideration of the whole merits of the question taken together: That he apprehended nothing could shew more clearly the danger of a separation which had been attempted in this cause, than the interlocutor under review; for while it was nearly the unanimous opinion of the Court, that *from the circumstances of the case*, damages were due by the defender to the pursuers, which clearly carried expences as an accessory; yet, by the interlocutor, no expences were found due, as if the matter before the Court had been merely an abstract point of law.

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By this means the pursuers had been deprived of expences, although they had succeeded in a reduction of the sale of the estate, which was the completest remedy they could get; while they would have been entitled to expences if damages had been given, which was the most incomplete remedy.

That in these circumstances, he considered it his duty to request their Lordships particular consideration to the special circumstances of this cause; and craved their judgment accordingly.

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A P P E N D I X.

OPINION of Lord CHANCELLOR THURLOW, in the Case of *Fox* against *Mackreth*, mentioned in the foregoing Minute, taken from Brown's Reports, vol. II. p. 420.

LORD Chancellor.—The doubt I have is, whether this case *affords facts*, from which *principles arise* to set aside this transaction, which will not, by necessary application, draw other cases into hazard. And without insisting upon technical morality, I don't agree with those who say, that where an advantage has been taken in a contract, which a man of delicacy would not have taken, it must be set aside. Suppose, for instance, that *A.* knowing there to be a mine in the estate of *B.* of which he knew *B.* was ignorant, should enter into a contract to purchase the estate of *B.* for the price of the estate, without considering the mine, Could the Court set it aside? Why not; since *B.* was not apprised of the mine, and *A.* was? *Because B. as the buyer, was not obliged, from the nature of the contract, to make the discovery.* It is therefore essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, *but it must arise from some obligation in the party to make the discovery.* The Court will not correct a contract, merely because a man of nice honour would not have entered into it; it must fall within some definition of fraud: The rule must be drawn so as not to affect the general transactions of mankind. His Honour has referred a great number of accounts to the Master. If the account in the present case is necessary to lead to the judgment, the latter should have been suspended till the former was taken. I shall state the case merely at it stands on the

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the transaction upon the day of the sale. I shall also consider; that there are certain terms which I must find in analogy to the character of a juryman. In the *first* place, I must find the value of the estate to be the sum for which it was sold to Page; for it will be in vain to argue, that there was any confidence reposed in Mackreth, or fraud committed by him, if no loss accrued to Fox. If the value of the estate be that which Mackreth gave, it would on that side put an end to the dispute. If the value be such, as now represented, that does not make an end of the matter, unless the advantage was procured by some of those frauds which the Court has taken notice of. The Master of the Rolls has decreed the defendant *to be a trustee for Fox*. He becomes such by consequence; for if it be true, that he has cheated Fox, though the legal estate passed to him, *the equitable claim is Fox's*. But this argument does not turn from the mere circumstance of value; for suppose the estate to be worth L. 50,000 on the 16th January 1778, and that Mackreth bought it by fraud for L. 40,000, whereby Fox was cheated of L. 10,000; and, suppose, by cross events, the value had sunk more than one-fifth, and Mackreth had sold it, according to the then market-price, at L. 40,000, or even so low as L. 30,000, would it not be equally true, that he ought to be decreed to pay L. 50,000 for the sum due, *in respect of what Fox lost by the fraud of Mackreth*? And if you can ever establish in a court of equity, that a contract has been fraudulently made, and that a party to that contract has lost by that fraud, in the common case, whatever the conveyance be, *the party will have that money to pay*.—Therefore his Honour went upon the ground, that the value of the estate at the time of the sale was L. 50,000, that Mr Fox was consequently cheated, and, the contract being to be set aside, the sale made afterwards was a sale made for him *who had in point of equity a right to it*. Taking this as the point on which it turns, *I wish to go through the facts*. Fox's distresses began about four years before he came of age; he had involved himself and his friends in annuities upon the hardest terms. When he came of age, as a man of honour, he was under a duty of imperfect obligation, to relieve the friends he had involved. In this situation, which was observed by his friends, before he became of age, a plan was proposed, to sell such part of his estate as was disposable. When he came of age, he had an estate of about L. 1260 a-year, in Surry, that was an estate-tail, capable consequently of being disposed of when the time for cutting

cutting of the intail should arrive. He had also an estate in Yorkshire, of about L. 11,000 a-year, for life, and one in Ireland, for life, of which he was in possession, of about L. 6000 a-year. His friends had resorted to a man of character in the profession to conduct the disposal of the Surry estate. On the 23d August 1777, no steps had been taken, even to get in the amount of the debts, or negotiating with the annuitants for an accommodation of their demands, though it must occur to every body, that before he came of age would have been the best time for arranging those contracts, and conversing with the annuitants about arranging that circumstance. He came of age in August, and upon the 23d of September it appears he had been introduced to Mackreth. The terms they were then upon were not confidential. Fox applied to Mackreth to raise L. 3000, and informed him of his situation, and that no security could be made him till the next term, when a recovery might be suffered. Mackreth then proposed an annuity at six years purchase; (something near half less than the actual value), after that, a man cannot talk of any delicacy without the bars of the court of justice. If a court of justice is bound to affirm such transactions, it is not from its approbation of them, but because, it would be impolitic and distressful to the general affairs of mankind to cut them down. When that situation was disclosed to Mackreth, a mortgage of that estate would have been an effective lien upon it, and the way to have made a security would have been, to have insured his life till the end of next Michaelmas Term. Under that species of contract the merciful and just manner of relieving his distresses would have been, to have advanced the money upon such mortgage. On the other hand, it ought to be observed, that though Mackreth took a different course with him, it seems to have been (if there is not too much levity in saying it), in the course of his business, for it is in evidence that Mackreth dealt in this way, on the distresses of mankind. On the 6th of November, a recovery was suffered of the Surry estate to Farrer, to such uses as Fox should direct, but nothing was then done towards getting rid of the debt. On the 24th of December, Fox sends to borrow a sum of money, Mackreth lent him L. 3000, and took a mortgage by way of security. Great pains have been taken to impute great generosity to Mackreth on this occasion. I see no reason to say so, neither do I see that there was at time any plot; on the contrary, I consider that as a very fair transaction; and it would be an extravagant conjecture for a court of justice to suppose that the object of lending him that, was to get the legal estate
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into his hands, to tamper with it afterwards, to the prejudice of Mr Fox. When once one gets beyond the evidence that is before the Court, there is no end of conjecture. Mackreth then acquiesced with the project of delivering Fox from his distresses, and industriously offered himself and Dawes as trustees for that purpose; I do not agree, that, by that, there was any plot to get him into bad hands. There are no better men for trustees on such an occasion, than those who will do the business: And though Lord Ligonier and Lord Grantly were proposed on the part of Fox, yet the others, as men of business, might be quite as proper. When Mackreth proposed himself as a trustee, I think he meant what he said, and that there was a real act of friendship intended, to make the most of the estate, and to deal to the best advantage with the annuitants. *An awkward circumstance* is, that *himself and Dawes were of that number*, Mackreth himself to the amount of L. 250, and Dawes of L. 600 a-year; these being L. 850, and I suppose there being five or six times that quantity on the whole. When he undertook to deal *with these annuitants at large, and himself in the number*, he certainly took upon himself *a very delicate charge*. The manner in which he dealt for this annuity was to consider the arrears which had been incurred, from the 23d September to the 23d of December gone, as due to the annuitant, and then he was to take up that sum at the original price; so that nothing more was to be paid for the annuity, but an arrear that had been incurred after the rate of L. 850 a-year, which was a little more than L. 200 to take up that; and, when he had done so, that annuity was to be discharged.—I do not approve of that: Who can possibly suppose Mr Mackreth recommending himself to Mr Fox, as a man who would deal more vigilantly with annuitants than another; and in the first instance allowing the annuity to stand for an arrear which had gone only for a quarter; I think he should have considered it as a loan from the beginning.—So of Dawes's share of the annuity, it should have been considered as discharged on 24th December. He bought, however, on the part of Mr Fox, but with his own money. Upon the 16th of January, instead of considering it as an annuity discharged on the 24th December, he considers it as bought up for his own use; and therefore he was to continue an annuitant of Fox, after he had bought it of Dawes, to the 16th January. *It is impossible to say he has not in this gone a little farther than that species of indelicacy* which a court will look at, for he shall not have the annuity till January, it shall be considered as discharged in December; and yet, from the manner

manner in which he has dealt with the annuitants in general, it seems to me as if he thought this a fair way of dealing between man and man, in that market; and I should have thought so universally, had I not observed, that in regard to one of the annuitants, he has compromised it at a lower rate than that; and instead of regarding the annuity as due, as to the principal sum, and the arrears due, which is the manner he charged it in Oct. 1778, it turns out that he had bought it below that rate, although he had charged Fox, in October 1778, up to the rate as if he had made the bargain fairly with the annuitant.—*In these two instances his conduct must be rescinded, and he has acted unfairly in the execution of the trust he had taken upon him.* Mr Fox, the plaintiff, has therefore the advantage of finding Mr Mackreth dealing with him respecting himself, as a man who would serve him with fidelity, though he had an interest himself, and acting unjustly in a manner which a court of justice must rescind. From hence, till the 16th January, I consider him *as a trustee, and whatever consequences arise from that relation, must belong to this business.* He sends down an agent (Hampton) to value the estate, and he has managed so as to prevent the Court from looking much at what was done in consequence of the orders which were given to Hampton. Courts of justice are to act temperately, *but must consider what is the result from the several parts of a transaction.* On one side it is said, that he sent down the agent to value the estate, as meaning to treat himself; but I think the fair construction is, that *he sent him in the character of a trustee.* He was beginning to act as such, *with an intention to sell the estate at the best advantage, therefore it was part of the execution of the trust.* Hampton's knowledge was Fox's knowledge. *But wherever a trustee gains intelligence as a trustee and servant to the cestui que trust, and conceals the circumstances he so gains knowledge of from the cestui que trust, he may have the hands of a court of justice laid upon him as a fraud.* I find myself at a loss as to what passed between Mackreth and Hampton; he went down twice, the first time he was there a week, the latter time longer; but the result of the intelligence he got the second time, could not be of any use. The intelligence he got the first time was communicated to Mackreth. In these circumstances he begins to deal with him, and there also he remains *in the character of a trustee.* Fox had a valuation of the estates, by Jackman, not a long one, but such as afforded general terms, such as the naming a gross value of the estates, and the number of years value set upon them. This Fox had in his hands, and, with this valuation *in medio*, Fox insists, that the value of the estate is L. 45,000. Mackreth reasons, and asserts, *first*, that the
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houses are valued too high, that he would only give $\frac{14}{100}$ of the value, he offering 14 years purchase for them.—That he will not give 30 years purchase for the land, he will only give 28 or 29 years purchase; that he looked upon the valuation the copy hold, part of the Horsely estate, as much too high. He argues upon them, and haggles Fox down, till, either from conviction, or from the consideration of his circumstances, they meet at L. 39,000. The question arising on this is, *whether the character of trustee shall vary Mackreth from a stranger*; for it is not argued, that in the case of a stranger treating in the same manner, the transaction must be cut down. If a trustee treats with a stranger, as a trustee for himself ever so fairly, the vendee would be a trustee for the first cestui que trust, and the Court will not consider whether the consideration was fair or not, which must be by reason of the confidence which the accident of their relation introduced; then the question is, whether I can find, as a jurymen, that Fox agreed to the proposal in confidence of Mackreth's knowledge and integrity. If a stranger had said to Fox, *I will deal fairly with you*, and afterwards misrepresented the value, I should hold that to be an abuse of a confidence which he was bound to observe. Was that the case here? I confess I am in doubt; I do not see that I have facts from which to draw that inference. But if Mackreth had not the character of trustee, he might retain that of confidential friend. I am at a loss to find that. They seem to have dealt as men usually do, each endeavouring to represent the case as makes best for his own interest. There are two facts to be settled, *first*, what was the real value: No body will think Mackreth's criticisms on Jackman's valuation unnatural or unfair. There is evidence that Jackman would have given the money at which he estimated the estate, if he had had it; that it sold to Page for more, which is strong evidence to shew that the value was more. Suppose it to be allowed, that the real value was what Page paid; let us see what followed. On the 16th of January, Garforth put the agreement into writing, and it was signed by both parties. This struck me as shewing an eagerness to have the matter fixed; but from the evidence it appears, that the article for the sale was not entered into till the day after, when they carried it to one degree more of formality. It stands upon the articles till the 24th of April. In the mean time, Mackreth had sold the estate. No man of delicate honour would have carried the contract into execution on the 24th of April, after he had sold the estate, on the 20th of March, and have kept that transaction a secret. He was obliged, by every call of honour, to consider himself as a trustee; but

but I fear, that if I should lay down the rule, that the Court will compel whatever a man of strict honour would do, I should go too far, and might lay down a rule which would be inconvenient in other cases. Observations are made on the note given by Mackreth to Fox, it was an accountable receipt, bearing 5 *per cent.* interest. Fox had not the money. I think this, as Mackreth was to apply it in the payment of annuitants, was fair. The security, being only that of an equitable lien, does not afford any inference of fraud being intended; and in fact the money has been paid. The method of making up the account, has been urged *as a mark of confidence.* It is true, it is so; but the question is, Whether it was *a confidence that he would give him a fair value.* As to the confirmations, they follow so naturally from the occasions, that they cannot be said to have been sought for by way of obtaining confirmations.—With regard to confirmations, they have been considered different ways. In *Chesterfield v. Janßen*, it turned upon Spenser doing the acts with his eyes open.—There he stood liable to the former bond; but there is another way in which confirmations operate, that the party looks upon himself to have been dealt fairly with. In January, Fox did not consider himself as having any unfair advantage taken of him. In that view it goes further, for there was no complaint till 1781. It is fair to infer, that so large a difference of value was not expected in so long a time. When would a transaction of this sort be at an end, if not after three years? And it *would have lasted in the same way till 1800, had not the discovery been made of the subsequent sale.* It goes much to the question of the real value, that it could not be fixed till a subsequent sale. If the price paid by Page was accidental, no man could argue from that, to there being a fraud in Mackreth. It must be ascertained what was the real value of the estate at the time of the sale. Evidence of this has been given only on one side, Mackreth having been advised to shew that contract, which leads to a consideration how far it would be conducive to the question to have that part further enquired into; it would put an end to the question on one side; on the other, it would leave it open. I have been desirous of stating my doubts, because, possibly I may think it necessary to have this undergo a further consideration. After conversing with his Honour, and near half the judges, a doubtfulness and difference of opinion has arisen as to the policy of laying down the rule, either of law or evidence, to the extent now contended for. I own I hesitate

hesitate to lay down any such rule upon the subject. *It is of no use to lay down the rule of law, if the rule of evidence is left indefinite.* Two ways have struck me, one to let this matter go to a further enquiry; the other, to which I have been more inclined, to have it reheard, with the assistance of those who will furnish me with the means of laying down the rule which may set men at ease for their property; that when they observe a transaction for the sale of an estate cut down for inadequacy of value, after it has been affirmed by conveyances, and acquiesced in for three years and a half, I may know how I can state such a case, as mankind shall understand, without putting them in fear with respect to the regulation of their property.

The cause stood over till this day, (*viz.* 14th December 1788,) when the Lord Chancellor gave judgment to the following purpose:

LORD CHANCELLOR.—I have considered of the case of *Fox versus Mackreth*, and have examined it very much. I have read over all the arguments, my opinion is not varied since I spoke of it at large; I cannot see that the decree is wrong, and therefore it must be Affirmed.

From this decree of affirmance, the defendant appealed to the House of Peers.—And on 14th March 1791, the decrees were affirmed, with L. 200 of costs.



